

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A), M. Twomey (J.A), F. Robinson (J.A)]

Civil Appeal SCA 29/2016

(Appeal from Supreme Court Decision CS199/2011)

Falcon Enterprise

Appellant

Versus

David Essack

1st Respondent

The Wine Seller (Pty) Limited

2nd Respondent

Eagle Auto Parts (Pty) Limited

3rd Respondent

Heard: 06 December 2018

Counsel: Mr. K. Shah for the Appellant
Mr. A. Derjacques for the Respondents

Delivered: 14 December 2018

JUDGMENT

A. Fernando (J.A)

1. The Appellant (then Plaintiff) had filed action before the Supreme Court against the 1st and 2nd Respondents (then Defendants) and against Mahe Shipping Company Ltd (the 3rd Defendant earlier). The case against Mahe Shipping Company Ltd was later withdrawn. The Appellant had sought orders from the Supreme Court that:
 - i. the contents of container DVRU 1212985 belongs solely to the Appellant, and
 - ii. to release the same to the Appellant, and in the alternative
 - iii. for an order that the Respondents jointly and severally pay the Appellant the sum of SR 374,000.00 (which was made up of Rs

200,000.00 as value of container, Rs 4,050.00 as storage costs to date and continuing, Rs 100,000.00 as loss of business and Rs 70,050.00 as loss of profits), plus continuing storage costs; and costs of the action.

2. The Supreme Court by its judgment dated 7th October 2016, dismissed the claim of the Appellant and declared, that the container DVRU 1212985 together with its contents belongs solely to the 3rd Respondent, the Intervener Eagle Auto Parts (Pty) Ltd, who was granted leave to intervene and ordered that it be released to the Intervener and had awarded costs to the Respondents as against the Appellant.
3. It is against this judgment that the Appellant has appealed. There are no cross-appeals.
4. The Appellant has sought by way of relief from this Court that the decision and order of the Supreme Court be quashed and for an order that the Respondents jointly and severally pay the Appellant the value of the container of goods (SCR 200,000/-) together with damages and costs and costs of litigation.
5. It should be stated at the very outset, that on being questioned by Court, it transpired at the hearing of this appeal that the container and the goods which arrived in Seychelles 18 years ago and was in a warehouse, is now lost. None of the parties to the case could offer an explanation as to what has become of it. The Appellant does not lay any blame on the Respondents for the loss of the container in its pleadings or otherwise. It is also clear from the Ruling of Perera J dated 20th August 2001, that it was the Appellant who had objected to the release of the goods in the container to the Intervener. Facts being such it would be improper and unfair for the Appellant to request of this Court to make order that the Respondents jointly and severally pay the Appellant the value of the container of goods (SCR 200,000/-) together with damages and costs. This alone should suffice to dismiss the appeal. I have however decided to go into the question of the ownership of the goods contained in the container.

6. The Appellant, a Partnership between Marco Francis and Celine Francis, according to their Complaint were involved in the import and wholesale of automobile spare parts. The Appellant had averred that the 1st Respondent who was a businessman had “sometimes acted as an agent” for them. It was the Appellant’s position that they had imported a container of spare parts from Dubai to the value of Seychelles Rupees Two Hundred Thousand, exclusive of freight, the same being consigned in container DVRU 1212985 in favour and in their name. It had reached Seychelles on the 2nd of May 2000. It was the Appellant’s position that the 1st Respondent, who was in possession of the original bill of lading for the said container and whose mandate to act on their behalf was terminated on the 1st of May 2000, had failed and refused to return the original bill of lading to them. Further the 1st Respondent had attempted on several occasions in May 2000, to have Mahe Shipping Company Ltd (the 3rd Defendant earlier and agent for the shipping agent/consignor in Dubai), to release the said container to him personally. The Appellant had also averred that Mahe Shipping Company Ltd had refused to release the container to them on the basis of copies of the bill of lading in their possession and on the basis of a telex release from the shipping agent/consignor in Dubai. It had been the Appellant’s position that 1st Respondent had gone to Dubai on the 16th of May 2000, and contrived to have the name of the consignee in the bill of lading in respect of DVRU 1212985 falsely and unlawfully altered and changed from the name of the Appellant to that of the 2nd Defendant and had lodged it with the 3rd Defendant. The Appellant had averred “that according to the terms of the previous bill of lading made out in the Plaintiff’s (*Appellant’s*) name, this change should not be effected without the Plaintiff’s consent and which consent had not been sought nor given.” The Appellant had averred that the act of the 1st Defendant amounted to a *faute in law* by reason of which they had suffered loss and damages to a total amount of R 574,100.00.
7. The 1st Respondent in his defence filed along with the 2nd Respondent had taken up the position that he had “never acted” for the Appellant. It had been his position that he “invested approximately Rs200,000/- in Falcon Enterprise (*Appellant*) and is owed Rs 126,000/-, with profit, which is due and payable.” It had been the 1st Respondent’s position that the

Intervener, of which he is a director, owns the said container and its contents and he was in possession of the original bill of lading. He had therefore informed Mahe Shipping Company Ltd, in writing, not to release the said container, until legal ownership by the Intervener was accepted or confirmed. According to his defence he “personally, in Dubai, purchased and transported the said shipment to the Seychelles. Plaintiff’s (*Appellant’s*) name was utilised simply as a facility for importation, shipment and quota purposes. Plaintiff would receive a wholesale mark-up as a commission agent”. It is his position that he had “obtained the change, legally and lawfully, and in accordance with the laws of ownership in Dubai.” It had been his position that the Intervener should take possession of the container as it belongs to it. He had denied that they had committed a *faute* in law or occasioned any damage to the Appellant. D1 a letter from Marco Francis to the 1st Respondent and R. Barallon confirms the arrangement the 1st Respondent had with the Appellant to use the Appellant’s name as a facility for importation, and quota purposes. D2 a letter from Celine Francis to R. Barallon is to the same effect.

8. The Intervener in his Statement of Demand had stated that it owns container No. DVRV121985. It is the position that as a result of the Appellant obtaining a provisional order, seizing the container and its contents in the hands of Mahe Shipping Co Ltd until further order, it had incurred loss and damage, which it had claimed from the Appellant and has sought an order for the release of the container into its custody. The damage was on the basis of payments made to Mahe Shipping Co Ltd in a sum of SR 14,850 from 9th of May 2000 to the filing of its claim on the 26th of June 2000 and had also claimed the sums it would have to continue to pay until the release of the container to them.
9. The Appellant had not filed any papers to challenge the Statement of Demand by the Intervenor.
10. The case filed by the Appellant and this appeal rests entirely on the question of whether the Appellant owns the contents of container DVRU 1212985. This is the position taken up by the Appellant at the very outset of its Heads of Argument filed before this Court, by stating: “The

Appellant imported goods in a container from Dubai (No: DVRV1212985), which the Appellant in good faith paid for.” The relief prayed for from this Court is also for an order against the Respondents to jointly and severally to pay the Appellant the value of the container of goods (SCR 200,000/-) together with damages and costs and costs of litigation. In my view the only question that has to be answered by this Court in dealing with this appeal is did the Appellant own the contents of container DVRU 1212985 by virtue of having paid for the goods contained therein. All the grounds of appeal would be superfluous if this question is not answered in favour of the Appellant. In order to answer this question two other questions have to be determined, namely who paid for the contents and did the 1st Respondent act as an agent of the Appellant in respect of the payment and shipment of the merchandise in the container? As Plaintiff who brought the case, the burden was on the Appellant to first prove to Court, the above matters on a balance of probabilities and satisfy the court that it owned the contents of container DVRU 1212985 by virtue of having paid for the contents and that the 1st Respondent acted as their agent. The legal burden remains with the claimant throughout the trial to prove his case and not on the party who denies it. The Roman maxim *actor incumbit probatio* or ‘he who avers must prove’ applies. Similarly, and by parallel, article 1315 of the Seychelles Civil Code categorically states that ‘A person who demands the performance of an obligation shall be bound to prove it’. It would have been necessary to look at the Respondents case only if the Appellant had been able to satisfy the Court on these two matters. It would have been only then that the Respondents would have to show on a balance of probabilities that there was an agreement between them and the Appellant to use the Appellant’s name in the Bill of Lading as a facility for importation and shipment to meet the import quota purposes.

11. The learned Trial Judge had come to the following factual findings after analysing both the oral and documentary evidence:

- a) 1st Respondent never acted on behalf of or as agent of the Appellant,
- b) Documentary evidence supports the fact that it was the 1st Respondent who actually purchased the merchandise in Dubai and

- placed them in the container. The Appellant did not make any financial contributions at all towards the purchases of the merchandise contained in the container to the 1st Respondent,
- c) The 1st Respondent had inserted the name of the Appellant as the consignee on the Bill of Lading and organized with the carrier to ship the said container from Dubai to Seychelles,
 - d) It was the 1st Respondent who had at all times the full set of the original Bill of Lading in his possession,
 - e) The shipper and consignee who holds the complete original set of the Bill of Lading is entitled to possession of the goods,
 - f) At no material time was the Appellant ever in possession of the original full set of the Bill of Lading and as such was never in a position to be able to clear the container from the Shipping Agent in the port in Seychelles,
 - g) The Appellant attempted to falsely claim that the 1st Respondent stole the original set of Bill of lading from the car of Marco Francis, a Director of the Appellant.
 - h) After the container arrived in Seychelles, the 1st Respondent went back to Dubai and got the carrier to alter the Bill of Lading by deleting the name of the Appellant as the shipper and consignee and inserted the name of the Intervenor instead,
 - i) The alteration was regularly obtained as a matter of common practice and that there was an arrangement between the parties for the name of the Appellant to be used only as a facility for importation and shipment to meet the import quota purposes; in return for which the Appellant was to earn a commission based on the wholesale mark-up of merchandise,
 - j) Documentary evidence supports the fact that it was the 1st Respondent who actually procured the merchandise in Dubai and placed them in the container and thereafter organized with the carrier to ship the said container to Seychelles. In the process the 1st Respondent obtained and held in his possession the original set of Bill of Lading. The 1st Defendant had been doing this kind of transaction as part of his usual business ...Obviously, he had by then became well known to the carrier who drew up the original set of Bill of Lading. That explains how and why he easily managed to change the previous Bill of Lading by substituting the name of the

Plaintiff (*now Appellant*) with that of the Intervenor (*now 3rd Respondent*)

12. Having examined both the oral and documentary evidence in detail, I am satisfied that the learned Trial Judge had not erred in his factual findings above. These findings by the learned Trial Judge answer the only issue that is before this Court, as referred to at paragraph 9 above.
13. One of the essential issues that had to be determined in this case was as stated at paragraph 9 above, who paid for the contents of container DVRU 1212985? The basis on which the Appellant claims in its Heads of Argument that it paid and imported the goods in the container are that the bundle of 18 receipts produced as P 10 for purchases of goods, is in the name of Falcon Enterprise, the Appellant, and the receipt for the cash purchase. Obviously the receipts had to be in the name of Falcon Enterprise, namely the Appellant, as per the arrangement the 1st Respondent had with it and since the goods were not been purchased for the personal use of the 1st Respondent or on an individual basis. The Appellant has also claimed ownership of the goods and the container on the basis that the Bill of Lading for the said container which reached Seychelles on 2nd May 2000, was originally drawn in the name of the Appellant as consignee. This had to be viewed in relation to the 1st Respondent's pleading in his Defence that the "Plaintiff's (*Appellant's*) name was utilised simply as a facility for importation, shipment and quota purposes. Plaintiff would receive a wholesale mark-up as a commission agent". The oral evidence of the 1st Respondent and documentary evidence produced by the 1st Respondent in regard to payment of the goods contradicts the Appellant's position.
14. When the Appellant's witness Marco Francis was questioned at the trial by Counsel for the Respondents as to whether he remembers that the Appellant's name been used for quota purposes there was no denial by him and all that he could say was that he did not remember it. The Appellant failed to produce any evidence as to how it paid for the imported goods, save for the oral testimony of Marco Francis that they had made arrangements with one Xavier Francis, an uncle of Marco Francis to make the money available for the 1st Respondent in Dubai.

Xavier Francis never testified before the Court nor was any evidence led as to how and through whom the moneys were going to be handed over to the 1st Respondent. When Marco Francis was specifically questioned as to how the money was going to be given to the 1st Respondent in Dubai, all that he could say was that “somebody” was to give him the cash. The Appellant did not produce any bank documentation showing any transfer of moneys by Xavier Francis to Dubai.

15. It had been the 1st Respondent’s evidence before the Court that the money for the purchase of goods was from him and Mr. Barallon, who owns 50% of shares of the Intervenor company. He had produced receipts to show that moneys had been transferred from his account in the UK for these purchases. He had also produced several receipts from Thomas Cook, Al Rostamani Exchange company in Bur Dubai showing exchange of USD, French Francs and Italian Lira to dirhams, during the period 14th -16th February 2000. It had been the evidence of the 1st Respondent that he had exchanged the foreign currency that belonged to him to dirhams to purchase the goods.

16. The other issue was, did the 1st Respondent act as an agent of the Appellant in respect of the payment and shipment of the merchandise in the container? When Marco Francis was questioned as to whether he had any documents to show that the 1st Respondent was the agent of the Appellant, his answer was in the negative.

17. The learned Trial Judge had the opportunity to see the witnesses and make a determination as to the credibility of their evidence after going through the documents produced by the two parties. The learned Trial Judge has at paragraph 59 of the judgment stated “I believe the 1st Defendant (*now 1st Respondent*) when he averred that there was an arrangement between the parties for the name of the Plaintiff (*now Appellant*) to be used only as a facility for importation, shipment and most importantly to meet the quota purposes. In return the Plaintiff was to earn a commission based on the mark up of the merchandise.” He had also stated at paragraph 60 of the judgment that after analysing the documents produced in the case he has concluded that the Plaintiff did

not make any financial contributions at all towards the purchases of the merchandise. A court of appeal will only interfere with a trial judge's findings on facts where they are found to be perverse.

18. Facts being such, I have no hesitation in holding that the Appellant had failed to prove that it paid for the goods the container No. DVRV 1212985 and imported it to the Seychelles. That suffices for me to dismiss the appeal as that was the only issue that had to be decided by the Trial court on the basis of the Plea filed by the Appellant. The rest of the grounds of appeal are only academic and are of no relevance to the determination of the appeal of the Appellant.
19. The fact that the original Bill of Lading was in the name of the Appellant, as consignee does not suffice by itself to prove that the Appellant was the owner of the container containing the goods in the light of the evidence stated above. The Appellant has placed reliance on articles 101 and 102 of the Commercial Code of Seychelles Act in support of his argument. No doubt according to article 101 of the Commercial Code a consignment note or a receipt for goods delivered shall be evidence of a contract between the consignor and the carrier. However according to the said article the Court may, however, freely determine in respect of such contracts, the extent to which evidence other than the aforementioned consignment note or receipt shall be taken into account. According to article 102 of the Commercial Code where a consignment note makes reference to a named party as consignee such reference shall only be prima facie evidence that the consignee is entitled to the possession of the goods consigned. The 1st Respondent who was the purchaser and one who actually shipped the container, was entitled to change the name of the consignee from the Appellant to the 2nd Respondent on surrendering the three copies of the original bill of lading which was in his possession. There was nothing in the original Bill of Lading to the effect that the 1st Respondent, the virtual shipper, had irrevocably given up any right to vary the identity of the consignee during the transit (e.g. through a "No Disposal" clause), and thus the 1st Respondent was entitled to replace any named consignee by a new one by way of proper notice to the carrier and payment of the necessary fees which the 1st Respondent did.

20. I therefore dismiss this appeal. I do not order any costs.

A. Fernando (J.A)

I concur:. M. Twomey (J.A)

I concur:. F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 14 December 2018